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IN THE

Supreme Court of the United States

October Term, 1965

No. 505

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; SAVANNAH BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,
Petitioners,

v.

HALDRED OVERSTREET.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PAGE

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Allowance of Writ	7
Conclusion	19
APPENDICES:	
A. Opinion of the Supreme Court of Georgia, dated April 29, 1965	1a
B. Order of Supreme Court of Georgia Denying Rehearing, dated May 7, 1965	25a

Table of Cases Cited

Apex Hosiery Co. v. Leader, 310 U. S. 469	17
Bates v. Little Rock, 361 U. S. 516	8
Burns Baking Co. v. Bryan, 264 U. S. 504	14
Cafeteria Employees Union v. Angelos, 320 U. S. 293	17, 18
Dallas General Drivers v. Wamix, Inc., 295 S. W. 2d 873 (1956)	17
Ex Parte Lyons, 81 P. 2d 190 (1938)	17
Giboney v. Empire Storage & Ice Co., 336 U. S. 490	14
Hughes v. Superior Court of California, 339 U. S. 460	15
Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N. Y. Supp. 259 (1934)	18
Liggett v. Baldridge, 278 U. S. 105	14
Lineberger v. Colonial Ice Co., 17 S. E. 2d 502 (1941)	17

PAGE

Milkwagon Drivers v. Meadowmoor Dairies, 312 U. S. 287 14

NAACP v. Alabama, 357 U. S. 449 ..... 8, 9, 10
NAACP v. Button, 371 U. S. 415 ..... 8, 9, 13, 17, 19
NAACP v. Louisiana, 366 U. S. 293 8
NAACP v. Webb City, 375 U. S. 939 18
NAACP v. Webb City, 376 U. S. 190 18
New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 ..... 12, 17
New State Ice Co. v. Liebmann, 285 U. S. 262 14
New York Times v. Sullivan, 376 U. S. 254 ..... 8, 12, 18

Plumbers Union v. Graham, 345 U. S. 193 15

Rice v. Asheville Ice Co., 169 S. E. 707 (1933) 17
Roseman v. United Strictly Kosher Butchers, 164 Misc. 378, 298 N. Y. Supp. 343 (1937) 17

Senn v. Tile Layers Protective Union, 301 U. S. 468 17
Shelley v. Kraemer, 334 U. S. 1 8
Smyth v. Ames, 169 U. S. 466 14
Staub v. City of Baxley, 355 U. S. 313 19

Terminiello v. City of Chicago, 337 U. S. 1 9
Thomas v. Collins, 323 U. S. 516 11
Thornhill v. Alabama, 310 U. S. 88 ..... 11, 17
1621, Inc. v. Wilson, 402 Pa. 94 (1960) 18

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Petitioners,

v.

HALDRED OVERSTREET.

BRIEF FOR PETITIONERS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on April 20, 1965, and rewritten on May 7, 1965 at the time of denial of a rehearing, in the above-entitled cause.

Opinion Below

The opinion of the Supreme Court of Georgia affirming and modifying the judgment of the trial court is not reported and is printed as Appendix A, *infra* at page 1a. The order of the Georgia Supreme Court denying petitioners' motion for a rehearing is printed as Appendix B, *infra* at page 25a.

Jurisdiction

The judgment of the Supreme Court of Georgia affirming the trial court's judgment as against all original defendants except the Georgia State Conferenee of Branches was entered on April 20, 1965 (at page 1a, *infra*). A motion for rehearing was denied on May 7, 1965 (at page 25a *infra*). An extension of time until August 30, 1965 to file this petition was granted by Mr. Justice Black on July 30, 1965. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3), petitioners having asserted in the courts below rights, privileges and immunities conferred by the Constitution of the United States.

Questions Presented

1. Has the Supreme Court of Georgia violated petitioners' right to freedom of association under the First and Fourteenth Amendments by affirming that the "mere presence" of some of the petitioners in an area where misconduct allegedly occurred creates liability on petitioners' part, regardless of the propriety of petitioners' acts, and by affirming a judgment in the amount of $85,793.05 against petitioners when such judgment represents judicial reaction to the activities of a lawful group attempting to eliminate racial discrimination by making the public aware of its occurrence?

2. Has petitioner National Association for the Advancement of Colored People, a New York corporation, been deprived of its property without due process of law under the Fourteenth Amendment by being held liable in damages for acts performed without its knowledge and by persons beyond its control?

3. Have the rights of petitioners under the First and Fourteenth Amendments to the United States Constitution to express themselves through peaceful picketing been

abridged by the issuance of an injunction against such picketing by the state courts of Georgia because of alleged misconduct by certain unidentified persons not shown to have been connected with or under the control of petitioners?

4. Have the rights of petitioners under the First and Fourteenth Amendments to advise the public through peaceful picketing of a grievance they believed to be genuine been abridged by requiring the jury to adjudicate the legitimacy of such grievance as a prerequisite to finding the picketing to be entitled to constitutional protection?

Statement

A. Prior Proceedings

Petitioners are the National Association for the Advancement of Colored People (hereinafter called NAACP); Savannah Branch of the NAACP; and some members of the Savannah Branch individually. They were tried with the Georgia State Conference of NAACP Branches in November, 1963, in the Superior Court of Chatham County, in the State of Georgia, on a petition alleging conspiracy to destroy respondent's business by picketing his premises and inducing others to refrain from patronizing the establishment. The petition sought a temporary and permanent restraining order as well as compensatory and punitive damages. A temporary restraining order, entered on June 22, 1962, was made permanent by the jury after trial. The jury also awarded damages as against all of the original defendants in the amount of $85,793.05, consisting of $35,793.05 compensatory and $50,000.00 punitive damages. Thereafter, petitioners filed a motion for a new trial based upon general grounds and on April 17, 1964, additional time having previously been allowed by the trial court, twenty-four specific grounds were enumerated in an amendment to the original motion for a new trial. This motion was denied by the trial court on October 9, 1964. On

appeal to the Supreme Court of Georgia, the clerk of that court by letter dated February 11, 1965, requested respondent to furnish supplementary briefs on the liability of petitioner NAACP and Georgia State Conference of Branches and on the damage award. Thereafter, on April 20, 1965, that court affirmed the judgment as against individual petitioners Law and Jaudon and as against the Savannah Branch of the NAACP and the national office of the NAACP and reversed as to the Georgia State Conference of Branches. Petitioners' motion for a rehearing was denied by order dated May 7, 1965 and certain portions of the original opinion were rewritten but remained dated April 20, 1965. On July 30, 1965, Mr. Justice Black granted petitioners' motion for an extension of time to file a petition for writ of certiorari until August 30, 1965.

B. Evidence Presented

Petitioner Law is a resident of Savannah County, Georgia, and President of petitioner Savannah Branch of the NAACP and the Georgia State Conference of Branches, NAACP, both of which are unincorporated bodies, operating as independent units, under charters granted by petitioner NAACP, a New York Corporation (R. 152-54). Petitioner Reverend F. D. Jaudon is First Vice President of the Savannah Branch, NAACP (R. 185). Respondent is the owner and operator of a retail open-air market located in a Negro residential area in Savannah (R. 386, 266).

On May 30, 1962, Robert Lee Bolton, a Negro boy of fourteen and respondent's only Negro employee, reported to the principal of his school and to his mother that he had just been physically assaulted by respondent who had falsely accused him of stealing merchandise from the market and had hit and kicked him in his head, stomach and back. The boy reported that respondent was intoxicated at the time of this incident (R. 540-547).

A complaint of assault against respondent was immediately lodged with the Savannah police by young Bolton (R. 548). When the boy and a white police officer went to respondent's premises to serve the warrant, they found him asleep in his chair and the officer supported the boy's contention that his employer appeared to have been drinking (R. 588, 591). Young Bolton's injuries required his hospitalization for a period of 48 hours and the physician who examined and treated him at the hospital testified that he was in a condition of shock, with head swelling and stomach and back tenderness and pain (R. 529-530).

Bolton's mother testified that after she had taken her son to the hospital and returned home, she received several threatening telephone calls and that when local police failed to respond to her request for help, she contacted petitioner Savannah Branch, NAACP (R. 503-509). Petitioner Law testified that as a result of Mrs. Bolton's request for help, a membership meeting of the Savannah Branch was called for the next night, at which it was determined to organize a campaign to withhold patronage from respondent because of his assault on the young Negro boy (R. 469-470). He further testified that in order to effectuate this plan, it was decided to place two pickets on each corner of the street surrounding respondent's market for the purpose of advising all potential customers that the pickets were not buying there because respondent had mistreated a Negro employee, and to request them also to withhold their patronage (R. 165, 470-478). The pickets were instructed to act in a courteous and orderly manner (R. 166, 477-478).

On the following day, pickets were stationed in accordance with this plan and the picketing continued until June 22, 1962, when the temporary injunction prohibiting their presence was entered.

Respondent testified that he at no time assaulted young Bolton, but had discharged him because he stole food (R.

389). He claimed that the picketing of his premises had seriously injured his business because it resulted in the refusal of patrons to enter his store. It was respondent's contention that this refusal was based upon fear caused by the congregation of persons in large numbers blocking the entrance to his market, threatening his employees, intimidating his customers and, on several occasions, acting violently (R. 393-394). However, respondent did not present any evidence that any of petitioners engaged in or authorized these actions or that they were physically present when they allegedly occurred. Respondent's five employees who also testified—over the continued objections of petitioners' counsel—as to threats, intimidation and violence by persons they called "pickets", were in no instance able to identify the perpetrators or the time the incidents occurred or to state that petitioners or anyone they recognized as a member of petitioner organizations were present when these incidents took place. On cross-examination, the testimony of respondent and his witnesses indicated they automatically assumed any "colored persons" seen in the vicinity of the market (which was in a Negro neighborhood) to be a "picket" (R. 193, 202-203, 266, 275, 319-323, 333, 364-365, 367-368, 404-405).

In rebuttal of respondent's claim that he had lost business as a result of the picketing, petitioners offered evidence to show that respondent's financial difficulties predated the picketing and were due to the competition of a new and more modern open-air market located across the street (R. 361, 397, 449).

At the close of respondent's case, and at the conclusion of their own, petitioners made motions to dismiss the petition for non-suit and for a directed verdict, arguing, *inter alia,* that petitioners had been engaged in a peaceful protest and were entitled to protection under the United States Constitution and that respondent had failed to prove any connection between petitioners and the illegal conduct which allegedly was the cause of his damage (R. 68-77). These

motions were all denied and the court proceeded to charge the jury that conspiracy and agency were inseparable in this case (R. 609); that it could find an illegal conspiracy among all petitioners on the basis of the evidence introduced as to the Savannah Branch meeting if it determined that the Branch members had not been justified in planning and executing a selective buying campaign because of an "individual altercation" between respondent and his young clerk (R. 609-610); that the jury could not view the picketing as constitutionally protected unless it found petitioners' version of the incident involving young Bolton to be true (R. 614-615); and that if the jury found the "mere presence" of the pickets had incited others unconnected with petitioners to illegal activity which harmed respondent, this would constitute sufficient evidence to hold petitioners legally responsible for respondent's injuries (R. 610-611). The jury then retired and returned a verdict in the amount of $85,793.05 as against all the original defendants.

In petitioners' subsequent motions for a new trial, in their appeal to the Georgia Supreme Court and in their motion for a rehearing to that court, they continued to urge as grounds for reversal that the inordinately large damage award constituted an attempt to limit their right to freedom of association, that the judgment constituted a denial of freedom of association and a deprivation of property without due process of law in violation of the Fourteenth Amendment and that there had been an abridgement of their right to picket peacefully under the First Amendment.

Reasons for Allowance of Writ

1. (a) The decision of the court below holds all the petitioners responsible for the alleged misconduct of persons not associated with or controlled by any of them. It affirmed a staggering judgment upon the assumption that

legitimate associational activities can be evaluated and penalized in the light of unforeseen later occurrences. Such a ruling represents a dangerous intrusion upon the First Amendment right to freedom of association as articulated in *Bates* v. *Little Rock,* 361 U. S. 516; *NAACP* v. *Button,* 371 U. S. 415; *NAACP* v. *Alabama,* 357 U. S. 449; and *NAACP* v. *Louisiana,* 366 U. S. 293.

This judicial deprivation of First Amendment rights is no less state action because this is a civil lawsuit between private parties. *Shelley* v. *Kraemer,* 334 U. S. 1. As this Court said in *New York Times* v. *Sullivan,* 376 U. S. 254, 265:

> It matters not that the law has been applied in a civil action . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See *Ex Parte Virginia,* 100 U. S. 339, 346-347; *American Federation of Labor* v. *Swing,* 312 U. S. 321.

The Supreme Court of Georgia fixed liability on petitioners for picketing respondent's market under two theories. First, petitioners would be responsible for the disorder of which respondent complained if some of them were present when it occurred (unless they could prove an intervening cause for the disturbance). Second, since misconduct occurred, petitioners must have conspired to commit it. In conformity with the first theory, the court approved the following charge to the jury by the trial judge:

> Did the pickets incite—were [sic] the fact that the pickets were there incite activity upon [sic] people who were not at all connected with the organization; and if that was incited by the pickets, *by their mere presence,* you could consider the pickets and the placing of the pickets as the proximate cause of what resulted. (Emphasis added) (R. 610-611).

It should be noted that there was no claim that the members of the Savannah Branch who were picketing

exhorted others to misconduct. The rule of law applied here is that petitioners were responsible regardless of the propriety of their own acts. This theory runs counter to the *ratio decidendi* of *Terminiello* v. *City of Chicago,* 337 U. S. 1, rehearing denied 337 U. S. 934, which held—in the context of freedom of speech—that the applicability of the First Amendment depended on the content of the speech and not the reaction of the audience. Thus, a speech urging others to illegal acts would not be protected, while an expression of dissident views without such urging would be privileged. This rationale is equally applicable to associational activities. *NAACP* v. *Button, supra,* at p. 430; *NAACP* v. *Alabama, supra,* at p. 460.

An attempt is made by the Supreme Court of Georgia to distinguish *Terminiello* (page 23a *infra*) by asserting that petitioners here had taken part in an illegal conspiracy. This conclusion is reached by reasoning backward. The existence of a conspiracy is inferred because of the disorder alleged to have taken place after the commencement of the picketing, and the prior scheduling of and attendance at a legitimate meeting is then labeled the formation of a plot. Unsupported allegations from respondent's petition are recited by the court as evidence:

> In response to the motion for rehearing, we wish to point out that a conspiracy to wrongfully, unlawfully and maliciously injure and damage plaintiff's business and put him out of business is charged against the defendants; that such conspiracy was formed at a mass meeting of the NAACP called by the defendants Law and Jandon, and that pursuant thereto picketing began the next day and continued until stopped by the Court. . . . (p. 22a, *infra*)

Questions of the admissibility of irrelevant evidence are resolved by assuming its relation to petitioners—the very fact in contention:

> Special grounds 5, 6, 7, and 8 objecting to testimony as to threats, acts of violence, cursing, use of

> vulgar language, and a pistol shot *by those picketing the plaintiff's place of business*, are without merit. (Emphasis added) (p. 20a, *infra*).

The court sums up its analysis of the record as follows:

> Counsel for defendant contends that the evidence did not show that the pickets placed by the N.A.A.C.P. committed the various acts outlined above. However, the evidence is undisputed that all was peace and quiet around plaintiff's place of business until the picketing began and it returned only after the defendants were enjoined from further picketing of the place. (p. 12a, *infra*)

This Court has made clear that ". . . a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button*, *supra*, at page 429. What the State of Georgia has attempted here through its judiciary is to call petitioners' conduct tortious and then use this label as a basis for invoking punitive measures against the NAACP and the Savannah Branch:

> . . . the pickets had no lawful or constitutional right to form a conspiracy to violate plaintiff's right to operate his business, where he was not infringing any of their rights, or to force him out of business as punishment for committing a misdemeanor upon one of his employees . . . (p. 23a, *infra*).

Petitioners claim no "right to form a conspiracy", and the record demonstrates that no such conspiracy existed. The meeting of the Savannah Branch was called to discuss charges of racial discrimination against respondent and to plan a lawful method of communicating these charges to the consumer public (R. 469-470, 478). The Supreme Court of Georgia cannot, by the use of the word "conspiracy", suppress group advocacy of legitimate ends.

If the opinion below is sanctioned by this Court, it will operate as a prior restraint on organizational activity in

the same manner as a state statute which makes mere attendance at a meeting illegal if disorder occurs at a later time. Such a result would vitiate the assurances in *Thomas* v. *Collins*, 323 U. S. 516, that peaceful assembly cannot be unlawful. As this Court made clear in *Thornhill* v. *Alabama*, 310 U. S. 88, 101, the First Amendment right of an individual or group to make public all matters of public concern may not be stifled by "previous restraint or fear of subsequent punishment."

(b) The judgment below further encroaches upon freedom of association because of the inordinately large damage award upheld by the Georgia Supreme Court. A dying business is awarded $35,793.05 in compensatory damages, and in addition punitive damages in the amount of $50,000.00 are affirmed despite a complete absence of proof that there was anything malicious in petitioners' conduct. Here again the court finds "evidence" of malicious intent by recording in its opinion allegations from respondent's petition as though they had been proven:

> At the meeting, the defendants *unlawfully, knowingly, and with malice* and the intention of putting plaintiff out of business, organized what they termed a 'Selective Buying' campaign to begin the next day at plaintiff's place of business . . . (Emphasis added) (p. 5a, *infra*).

Although the court states that there was no evidence that respondent's employee was beaten because he was a Negro (at page 24a, *infra*), it is clear that it was the belief of the Savannah Branch that race was the deciding factor (R. 469). Since respondent's customers were largely drawn from the Negro community, the maltreatment of a Negro boy would be of particular relevance to them. In the view of the Georgia Supreme Court, however, protest of such an incident would be malicious and justify the huge verdict here in issue.

The appellate court's rationale is in conflict with this Court's past holdings. As was said in *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 561:

> . . . [T]he removal of discrimination . . . is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation.

The fact that the damage award was affirmed without even an attempt to apportion it among the petitioners, despite the fact that there was no testimony concerning the involvement of petitioner Jaudon and the NAACP in New York in the picketing, is a further indication that it was the identity of petitioners and the nature of their aims which dictated the result.

This Court recognized in *New York Times Co.* v. *Sullivan, supra,* at p. 277, that the fear of damage awards "may be markedly more inhibiting than the fear of prosecution under a criminal statute." It was noted that the award given was disproportionate and unrelated to actual pecuniary loss. The effect of such judgments, whatever their ostensible basis, is to create "an atmosphere in which the First Amendment freedoms cannot survive." (*ibid.*).

Under the rule of law developed in the instant case, huge damage awards can be given in the State of Georgia whenever a commercial establishment claims that profits have been lost pursuant to selective buying campaigns (since economic damage *per se* gives rise to the inference of malice). The Georgia Supreme Court's affirmation of the proceedings below, which were in derogation of the rules of evidence, the laws of logic, and the United States Constitution, can only serve as an invitation to state

courts to expand the use of civil judgments to penalize legitimate group advocacy.

2. While it is petitioners' contention that to hold any of them legally responsible for respondent's injuries is to violate First Amendment rights, the finding of liability as to the NAACP, a New York corporation (the judgment as against the Georgia State Conference of Branches having been reversed) raises separate constitutional issues which require scrutiny by this Court. The record shows that the NAACP was unaware of the Savannah Branch meeting and of the picketing until it was served with the injunction papers (R. 182-184). NAACP branches are merely affiliates to which charters are issued. Under the charter, the NAACP would not have been advised of this action until the local branch submitted its annual report. It is thus difficult to apprehend the basis upon which a national organization can be held responsible for the program organized by one of its more than 1500 branches concerning a purely local matter.[1]

The Georgia Supreme Court relied heavily on the NAACP's decision to defend this litigation on its merits rather than to contest the state court's jurisdiction:

> The national corporation never at any time disavowed the agency of Law, Jaudon, or the Savannah Chapter in acting for it in this matter. It was notified of the action by Law. It came into court and defended the case on its merits, contending that a cause of action was not alleged or proven against them. (at p. 15a, *infra*).

This Court made clear in *NAACP* v. *Button, supra,* that no group may be penalized merely for using the avenue of the courts as a means of seeking redress. In the instant

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[1] Apparently the appellate court was initially also concerned with the question of how legal responsibility could attach to the national NAACP because the clerk of that court did request supplementary briefs from respondent on that question.

case, moreover, the NAACP was brought in by respondent as a defendant. It chose to defend on the merits because of the constitutional issues to be clarified.

The other premise suggested by the court below as evidence of an agency relationship was the NAACP's failure to "repudiate" the actions of the branch (page 15a, *infra*). The court did not explain why such a repudiation would be required in the absence of any agency relationship. In effect, the State of Georgia is attempting to compel the NAACP to denounce the lawful acts of the Savannah Branch in order to avoid an unconstitutional financial assessment.

Such a flimsy basis for the deprivation of property, especially when considered in the light of its effect on future NAACP programs in Georgia, raises a serious due process question under the Fourteenth Amendment. See *Liggett* v. *Baldridge*, 278 U. S. 105; *Smyth* v. *Ames*, 169 U. S. 466, 522; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513.

3. (a). The decision of the court below represents a direct repudiation of the standards evolved by this Court in a series of cases starting with *Thornhill* v. *Alabama*, *supra*, which analyzed the circumstances under which picketing is viewed as a form of expression afforded protection under the First and Fourteenth Amendments to the Constitution.

The Georgia State courts have attempted to mask their rejection of this Court's holdings by unjustifiably labeling the picketing here as "unlawful" both in nature and in purpose, and by treating this case as one involving only questions of local state law. However, the record shows that the picketing here is not of the type found beyond the purview of constitutional protection in such cases as *Milkwagon Drivers* v. *Meadowmoor Dairies*, 312 U. S. 287 (violence found in mass picketing); *Giboney* v. *Empire*

Storage & Ice Co., 336 U. S. 490 (picketing found to be aimed at violation of state antitrust statute); *Hughes* v. *Superior Court of California*, 339 U. S. 460 (picketing to obtain quota for hiring Negro employees found violative of state policy); *Plumbers Union* v. *Graham*, 345 U. S. 193 (violation of state right-to-work law was purpose of picketing). It is important to note that in each of these cases the Court reviewed the record in order to determine whether the state court's finding of illegality was supported by the evidence:

> . . . it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. *Milkwagon* v. *Meadowmoor Dairies*, *supra*, at p. 293.

The trial court's rulings during trial, its charge to the jury, and the opinion of the court below show clearly that both courts consistently employed circuitous and illogical reasoning in an effort to support their theory that petitioners were responsible for violence allegedly leading to respondent's injuries. Throughout the trial, the court permitted the jury to hear testimony concerning alleged acts of misconduct over petitioners' standing objection that there was no connection shown between petitioners and the perpetrators of such disorder (*e.g.* R. 230-231, 237-238, 244-247, 288). It is significant that most of this testimony concerned misconduct by persons identified only as "colored" (*e.g.* R. 193-195, 321, 363, 401, 231-232). Since respondent did not contend that all Negro residents of Savannah were members of petitioner Savannah Branch, NAACP, and since respondent's store was located in a Negro residential area, it is difficult to understand how this identification solely on the grounds of race could aid the jury and its admission only appears calculated to in-

flame racial passions and thus prejudice petitioners in the eyes of the jury. Although the court below (p. 24a, *infra*) goes to some lengths to establish that the picketing here did not involve a "controversy between the races" and that "the relation between this white storekeeper and the negroes of this community were obviously friendly and cordial, for his business depended upon their friendship and good will" as support for its holding that "this is obviously not a case of peaceful picketing to protest racial discrimination", it does not comment at all upon petitioners' objections to the admission into evidence of these racial descriptions.

The court did not analyze the testimony concerning the Branch's picketing—two pickets were placed on each corner of the street around the market to inform consumers of the charges of racial discrimination against respondent (R. 165, 470-478). Nor did the court comment on the instructions to the pickets to act in a courteous and orderly manner (R. 166, 477-478). However, it affirmed that petitioners were the "proximate cause" of the disorder alleged by respondent, and held the picketing to be illegal.

The purpose of the picketing was also ruled to be without constitutional support:

> . . . the sole purpose of the picketing of plaintiff's place of business was to injure and damage his business, as punishment of him for the alleged beating of a negro boy who worked for him . . . (p. 10a, *infra*).

The distortion in this description is easily seen when the testimony of the only witnesses who were present at the meeting is reviewed. Petitioners Law and Jaudon testified without contradiction that the decision to picket respondent's market was made only for the purpose of advising respondent's potential customers that respondent had assaulted a Negro employee and to urge them therefore to withhold patronage from him (R. 470, 478, 185-186). Such

picketing by members of a legitimate group for the purpose of disseminating information and attempting persuasion is of the same calibre as the picketing found entitled to constitutional protection in such cases as *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293; *New Negro Alliance* v. *Sanitary Grocery Co., supra; Senn* v. *Tile Layers Protective Union*, 301 U. S. 468; *Ex Parte Lyons*, 81 P. 2d 190 (1938); *Rosman* v. *United Strictly Kosher Butchers*, 164 Misc. 378, 298 N. Y. Supp. 343 (1937). It can no longer be questioned that the objective of "equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country" is lawful. *NAACP* v. *Button*, at p. 429.

Nor can the court sanction punitive measures against petitioners on the ground that picketing may cause economic damage. As was said in *Thornhill* v. *Alabama, supra* at p. 104:

> . . . effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society.

It is apparent that the approach employed by the state courts in the case at bar is one of pre-*Thornhill* days when picketing was considered a tort and unwarranted interference with private property rights. Since petitioners are certainly not in direct economic competition with respondent, application of restraint of trade statutes or policies are clearly inapposite. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469; *Rice* v. *Asheville Ice Co.*, 169 S. E. 707 (1933); *Dallas General Drivers* v. *Wamix, Inc.*, 295 S. W. 2d 873 (1956); *Lineberger* v. *Colonial Ice Co.*, 17 S. E. 2d 502 (1941). To allow this rationale to stand with-

out review by this Court is to permit serious inroads to be made on established constitutional rights.

This Court has previously granted certiorari in a case involving picketing of a commercial establishment to protest racial discrimination. *NAACP* v. *Webb City*, 375 U. S. 939. Although this case was later dismissed for mootness, 376 U. S. 190, the issues raised are again present here and in view of the $85,000.00 damage award, no question of mootness exists.

(b) The state courts have abrogated this Court's holdings in yet another respect. The Supreme Court of Georgia affirmed the trial judge's charge to the jury that unless it found petitioners' contention that respondent had assaulted his Negro employee to be true, petitioners could not claim First Amendment rights. The court also approved the further charge that if the jury found petitioners had *believed* the assault had occurred it could consider this as evidence of petitioners' good faith in mitigation of damages, but not as justification for affording the picketing constitutional protection (R. 614-615). Such a charge is clearly improper. Cf. *New York Times* v. *Sullivan, supra.*

The record shows that petitioners did not picket respondent out of malice or on a frivolous whim. It is undisputed that petitioners were advised by Bolton's mother of the incident as recited by the boy, and that he reported the incident to his school principal and returned to confront respondent accompanied by a local policeman. Whether young Bolton's story or respondent's version is absolute truth is not at issue. There need only be sufficient evidence that the picketing was not instituted for an unlawful purpose. *Cafeteria Employees Union* v. *Angelos, supra*; *1621, Inc.* v. *Wilson*, 402 Pa. 94 (1960); *Julie Baking Co.* v. *Graymond*, 152 Misc. 846, 274 N. Y. Supp. 250 (1934).

A group which questions majority positions and beliefs is unlikely to win a jury to its side of a controversy. Thus,

it is not difficult to predict that the establishment of a rule of law requiring jury approval of the merits of such a controversy would lead to the vitiation of free speech and the standardization of ideas—precisely what the First Amendment was created to prevent. Cf. *Staub* v. *City of Baxley*, 355 U. S. 313, 322.

As this Court said in *NAACP* v. *Button*, *supra*, at page 345: "For the Constitution protects expression and association without regard to . . . the truth, popularity or social utility of the ideas and beliefs which are offered."

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Supreme Court of Georgia

Decided: April 20, 1965.

1. (a) Every individual has a natural right to pursue a lawful occupation and to conduct his business according to his own plans and policies, where he does not offend the law or unlawfully infringe upon the rights of others. A person's business is property in the pursuit of which he is entitled to protection from tortious interference by a third person, who, in interfering therewith, is not acting in the exercise of some right.

(b) Plaintiff's petition alleging that he was operating a lawful business in a lawful manner and had not infringed upon the rights of the defendants, and that the defendants formed a conspiracy to damage and destroy his business as punishment of him for allegedly beating a fourteen year old negro employee, by picketing his store, and did pursuant to the unlawful conspiracy organize and conduct mass picketing of his store, where large numbers of pickets gathered around the premises, obstructed and interfered with the use of the public sidewalks and streets and entrance to plaintiff's store, harassed, intimidated and threatened customers who attempted to enter the store, and encouraged and induced the public to boycott his business and his employees to leave his employ, all of which was a part of the unlawful, wilful and malicious conspiracy to damage his business and to force him out of business, which did injure and damage his business, stated a cause of action for injunction and damages.

(c) Peaceful picketing for a lawful purpose is protected under the free speech provisions of the Constitutions of the United States and of Georgia, but mass picketing by use of force, violence, and intimidation, harassment and other like activities is not peaceful picketing such as enjoys constitutional protection, nor does the protection

extend to malevolent picketing for the sole purpose of punishing one who is accused of committing an assault and battery upon an employee, nor to picketing by the use of force, intimidation, violence or threats thereof to prevent or attempt to prevent any employee from continuing in the employ of his employer.

2. The court did not err in overruling the special demurrers for reasons set out in the opinion.

3. (a) As to the general grounds of the motion for new trial, the evidence amply supported the allegations that the picketing was not peaceful and was for an unlawful purpose.

(b) The evidence was sufficient to authorize the jury to find that an unlawful conspiracy to injure and damage plaintiff's property was formed by the defendants, Law, Jaudon, and other members of the Savannah Chapter of the N.A.A.C.P. acting as agents of the N.A.A.C.P. New York corporation and within the scope of their agency and that the conspiracy was carried out resulting in injury and damage to the plaintiff's property.

(c) There is no evidence to support the finding that the defendant, the Georgia State Conference of Branches of the N.A.A.C.P., participated in the conspiracy to picket and injure plaintiff's property or was in any way responsible for any damage done.

4. (a) The evidence amply supports the jury's award of compensatory damages in the amount of $35,793.05.

(b) The evidence of wilful, deliberate, wrongful and unlawful picketing of plaintiff's business causing great injury and damage to his property, was sufficient to authorize the jury to award punitive damages, *Code* § 105-2002; and

this court cannot say that the amount awarded was excessive, as punitive damages are fixed by the enlightened conscience of an impartial jury, and, the jury's verdict will not be disturbed by this court as the amount awarded would not justify an inference of "gross mistake or undue bias." *Code* § 105-2015.

5. For reasons set out in Division 5, the court did not err in overruling the twenty-five special grounds of the motion for new trial.

The plaintiff, Haldred Overstreet, brought his petition, as amended, in the Superior Court of Chatham County against the National Association for the Advancement of Colored People, hereafter designated N.A.A.C.P., a New York corporation doing business in Georgia, the Georgia State Conference of Branches of the N.A.A.C.P., an affiliate of the New York corporation of the N.A.A.C.P., the Savannah Branch of the N.A.A.C.P., an affiliate of the New York corporation of the N.A.A.C.P.; W. W. Law, individually and as President of the Georgia and Savannah affiliate of the N.A.A.C.P. corporation of New York, and F. D. Jaudon, vice-president of the Savannah and Georgia affiliates of the New York corporation of the N.A.A.C.P., and as representatives of the classes composing all members of the N.A.A.C.P., alleging a conspiracy among said defendants and all those represented by them to destroy plaintiff's business, the operation of a retail grocery store in Savannah, by picketing the store premises and inducing others to refrain from patronizing the establishment. The petition prayed for a temporary and permanent injunction and for compensatory and punitive damages. The defendants filed general and special demurrers to the petition as amended, and a motion to dismiss, which, with the exception of two special demurrers, were overruled. At the close of plaintiff's evidence, motions for nonsuit were made as to the defendants, the N.A.A.C.P., incorporated, the

Georgia State Conference of Branches of the N.A.A.C.P., and the Savannah Branch of the N.A.A.C.P., which motions were denied. The jury awarded the plaintiff compensatory damages in the amount of $35,793.05 and punitive damages of $50,000.00, a total of $85,793.05 and found for a permanent injunction. The exceptions are to the judgment of the trial court overruling the special and general demurrers and the motion to dismiss the petition, denying the motions for nonsuit, and the overruling of the defendants' motions for new trial on the general and special grounds.

MOBLEY, Justice. 1. (a) All the defendants were represented by the same attorneys and the defensive pleadings were in material respects the same. The rulings made here apply to each and all, as did the judgments of the trial court.

In brief, the petition as amended alleged that plaintiff owned and operated a retail grocery store at a named location in Savannah and had for 16 years, and had created good will and good faith in the course of his business with the public; that on May 30, 1962, he had in his employ a 14 year old Negro boy, who, one of his clerks advised him, had stolen some grocery items; that he admonished the boy and discharged him, and within about two hours, the boy and a police officer returned to the store and the boy accused him of beating him; that the boy's aunt on the same day swore out a warrant against him for assault and battery, and he charged the boy with stealing. That on the next night, May 31, 1962, at a named church of which F. D. Jaudon was pastor, there was a mass meeting of the N.A.A.C.P. and the Savannah Branch of the N.A.A.C.P. called pursuant to circulars distributed to members at the direction of Law to protest the alleged "beating of a fourteen (14) year old negro boy by the owner of the Tropical Fruit Market." Present were the defendants

Law and Jaudon, the defendant, Law, appearing and acting as agent of the N.A.A.C.P., as its agent, employee and servant, within the scope of his agency, employment, and service, and in the furtherance of the business of the corporation and in a like capacity with the Savannah Branch and the Georgia State Conference of Branches of the N.A.A.C.P. At the meeting, the defendants unlawfully, willfully, knowingly, and with malice and the intention of putting plaintiff out of business, organized what they termed a "Selective Buying" campaign to begin the next day at plaintiff's place of business; that pursuant to said plan defendants caused pickets to be placed adjacent to his place, who stopped customers and prospective customers on their way to his place of business, told them of the beating of the boy and urged them not to trade with plaintiff; that the picketing consisted of mass picketing in that numbers of pickets gathered around the premises of plaintiff, obstructing and interfering with the use of the public sidewalks and streets and entrance to plaintiff's business. That said mass picketing was a part of the conspiracy of defendants to intimidate customers from entering plaintiff's store and to force, intimidate, and coerce him into going out of business. That the pickets are harassing and intimidating customers from going into plaintiff's store by creating an atmosphere of possible violence thereabout by having large numbers of pickets in and around plaintiff's premises, by stopping all customer's and inciting and inflaming them against plaintiff and by telling them false and misleading statements as to plaintiff's conduct, all of which caused his customers to be fearful of trading with him; that defendants encouraged and induced the public to boycott plaintiff's business in order to accomplish their unlawful purpose of putting him out of business; that when the picketing began more than 2/3rds of his customers were negroes, and defendants knew this and they, the defendants, initiated and carried on the

unlawful, wilful and malicious conspiracy with the intent and purpose to damage him in the pursuit of his lawful business; that defendant, Law, was the leader of the pickets, was instrumental in placing them, directed their method of operation and participated as a picket, all of which acts were performed as agent of the N.A.A.C.P., the Savannah Branch and the Georgia State Conference of Branches and within the scope of his agency; that all of the acts constituted a general malicious scheme and conspiracy to force plaintiff out of business and to hinder him in engaging in a lawful business. It was also alleged that the pickets threatened physical harm to plaintiff's employees in an attempt to force them to quit his employ in violation of *Code Ann.* 54-801 (Ga. L. 1947, p. 620). It is alleged that as a result of said conspiracy he suffered described pecuniary loss of money in the operation of his business, that the good will which he enjoyed had been destroyed, damaging him in the amount of $40,000. He also asked $50,000 punitive damages.

The petition alleges an unlawful conspiracy of the defendants to destroy the lawful business of the plaintiff, which resulted in loss of business and damages to his property. "Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages." *Brown & Allen* v. *Jacobs Pharmacy Co.*, 115 Ga. 429, 441 (41 S E 553, 57 LRA 547; 90 ASR 126); *Cook* v. *Robinson*, 216 Ga. 328 (1, 2) (116 S E 2d 742). "Malicious injury to the business of another will give a right of action to the injured party." *Southern R. Co.* v. *Chambers*, 126 Ga. 404 (1) (55 S E 37, 7 LRA (N S) 926); *Original Ballet Russe, Ltd.* v. *Ballet Theater Inc.*, 133 F 2d 187; *Shell Oil Co. Inc.* v. *State Tire & Oil Co.*, 126 F 2d 971; *Boston Casualty Co.* v. *Bath Iron Works Co.*, 136 F 2d 31. See also *DeFoor* v.

Stephens, 133 Ga. 617 (1) (66 S E 786). "Where one maliciously and wrongfully, and with the intent to injure another person's business prevents others from dealing with him and his business is thereby injured, the person thus injured has a cause of action against the person thus causing the injury, for the loss and damage sustained." *American Oil Co.* v. *Towler,* 56 Ga. App. 866 (194 S E 223) citing *Brown & Allen* v. *Jacobs Pharmacy Co., supra.*

In 9 A L R 2d 228 in an exhaustive annotation dealing with "liability of one who induces or causes third person not to enter into or continue a business relation with another," it is said at p. 232 ". . . it would seem that the principle is generally recognized that a person's business is property in the pursuit of which he is entitled to protection from tortious interferences by a third person, who, in interfering therewith, is not acting in the exercise of some right, such as the right to compete for business" citing cases from many States, the United States Supreme Court, and this court.

"Every individual has a natural right to pursue a lawful occupation and to conduct his business according to his own plans and policies, where he does not offend the law or unlawfully infringe upon the rights of others." *Jones* v. *Van Winkle Gin & Co. Works,* 131 Ga. 336, 337 (62 S E 236, 17 LRA (N S) 848, 127 ASR 235). The plaintiff's business was a lawful business, was being operated in a lawful manner, and was property in which he had the right to protection in the use and enjoyment thereof. He had not in the operation of that business infringed upon the rights of the defendants. If he, as defendants contend, committed an assault and battery upon an employee, that is a criminal act, the punishment for which rests with the courts and not with individuals. Otherwise, we have anarchy. The alleged conspiracy to destroy his property by means of mass picketing of his store, intimidation and harassing of customers and employees simply because they may have thought he had

mistreated a negro employee was unlawful, *Jones* v. *Van Winkle Gin & Co. Works, supra*, (1); *Pedigo* v. *Celanese Corp.*, 205 Ga. 392, 397 (54 S E 2d 252), and constituted a tort against plaintiff by the conspirators for which they would be liable in damages, upon proper proof of the allegations.

Where, as here, a cause of action for damages for tort against the defendants is set out, the allegations showing a conspiracy make any actionable deed by one of the conspirators chargeable to all. *Cook* v. *Robinson*, 216 Ga. 328 (4), *supra* and cases cited therein. The liability is joint and several. *Smith* v. *Manning*, 155 Ga. 209 (2) (116 S E 813). A corporation may be a party to a conspiracy and may be held civilly liable for resulting damages to the same extent as a natural person. 16 Am. Jur. 2d 151 § 47. The allegations that the N.A.A.C.P. corporation, acting through its agents, conspired with others to damage and destroy plaintiff's business and performed described acts and did damage his property, stated a cause of action against the corporation as well as the individuals and the organizations which they represented and for which they acted. The trial court properly overruled the general demurrer to the petition, as amended, as to all the defendants.

1. (b) The motion to dismiss the petition on the ground that it failed to state a cause of action for the reason that the defendants have the right, protected by the Constitution of the United States, to engage in peaceful picketing and other forms of peaceful activity designed to persuade the public not to patronize a commercial establishment that practices racial discrimination, and that in engaging in these activities the defendants were exercising a right of freedom of speech and assembly guaranteed by the due process clause of the 14th Amendment to the United States Constitution, and the Constitution of Georgia is without merit.

First, there is no allegation that the plaintiff practised racial discrimination, nor any facts alleged from which such conclusion could be drawn. On the other hand, the petition alleges that more than 2/3rds of plaintiff's customers were negroes. The sole reason alleged for the picketing was the alleged assault and battery upon the 14 year old negro boy who worked for the plaintiff. It is not alleged that plaintiff was charged with beating the boy because he was a negro.

"The right to exercise freedom of speech by means of peaceful picketing carries with it no right to use force, violence, intimidation, harassment or the like. *Robinson* v. *Bryant*, 181 Ga. 722 (184 S E 298); *Local Union No. 3871, United Steel Workers of America* v. *Fortner*, 202 Ga. 206 (5) (42 S E 2d 734); *Burgess* v. *Ga. Fla. & Ala. R. Co.*, 148 Ga. 417 (96 S E 865); *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 206," *Pedigo* v. *Celanese Corp.*, 205 Ga. 392, 397, *supra*. The petition alleges the use of force, violence, intimidation, harassment and other like activities. Applicable here is the following from *Ellis* v. *Parks*, 212 Ga. 540, 542 (93 S E 2d 708): "The judicial theory that peaceful picketing is a form of free speech, as announced in Carlson v. California, 310 U. S. 106 (60 Sup. Ct. 746, 84 L. Ed. 1104), which is protected by the Constitutions, both Federal and State (Code Ann. §§ 1-801, 2-115), can not be stretched to malevolent picketing for the purpose of injuring the employer and aiding an unlawful strike. Both the Supreme Court of Georgia and the Supreme Court of the United States have held that a person can not employ lawful acts for spite and solely for the purpose of injuring another, and that such malicious purpose renders the acts unlawful. *Hornsby* v. *Smith*, 191 Ga. 491 (13 S. E. 2d 20, 133 A. L. R. 684); American Bank &c. Co. v. Federal Reserve Bank, 256 U. S. 350 (41 Sup. Ct. 499, 65 L. ed. 983, 25 A. L. R. 971)." See

also *Fleming* v. *H. W. Ivey Const. Co. Inc.*, 215 Ga. 460, 462 (2) (111 S E 2d 97); *Curry* v. *Construction & General Laborers Union Local No. 438*, 217 Ga. 512 (123 S E 2d 653). Where, as alleged here, the sole purpose of the picketing of plaintiff's place of business was to injure and damage his business, as punishment of him for the alleged beating of a negro boy who worked for him, the picketing is unlawful and not protected under the free speech provisions of the Federal and State Constitutions.

The picketing alleged here was unlawful for the further reason that it was in violation of *Code Ann.* §§ 54-801, 54-805 (Ga. L. 1947, pp. 620, 621) which provide: "It shall be unlawful for any person, acting alone or in concert with one or more other persons, by the use of force, intimidation, violence, or threats thereof, to prevent or attempt to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer, or from entering or leaving any place of employment of such employer" (§ 54-801). "It shall be unlawful for any person, acting alone or in concert with one or more other persons, by the use of force, intimidation, violence, or threats thereof, to prevent or attempt to prevent any employer from lawfully engaging or continuing to engage in any proper and lawful business activity, or from the proper, lawful or peaceable use or enjoyment of his property used or useful in the conduct of such business, or from acquiring materials or supplies for the purposes of such business, or from disposing of the goods, wares or products of such business, or to prevent or attempt to prevent any carrier or other person from supplying or delivering materials or supplies to any such employer, or from receiving or accepting delivery on the premises of such business of the goods, wares or products of such business" (§ 54-805). "It is a penal offense in this State to attempt by threats, violence, intimidation, or other unlawful means to prevent any person from engaging

in any lawful employment. . . ." *Robinson* v. *Bryant,* 181 Ga. 722, 728, *supra.* See *Code Ann.* § 66-9906 (Ga. L. 1887, p. 107); *Woodard* v. *Collier,* 210 Ga. 239 (78 S E 2d 526); *Powers* v. *Courson,* 213 Ga. 20 (96 S E 2d 577). The trial court committed no error in overruling the motion to dismiss the petition.

2. The trial court did not err in overruling the special demurrers numbers 3, 4, and 5. Special demurrers 1 and 2 were sustained by the trial court. Special demurrer 3 complains that the petition does not allege facts showing that any of the defendants committed alleged unlawful acts of harassing and intimidating customers of plaintiff by creating an atmosphere of violence around his place of business. The petition alleges a conspiracy among the defendants and others and that the defendant, Law, acting for the N.A.A.C.P., organized, directed and actually participated in the picketing, and that the pickets did harass and intimidate plaintiff's customers. The act of any conspirator would be the act of all engaged in the conspiracy, thus the allegation is sufficient. Special demurrer 4 complaining that the time and place the alleged acts of the pickets in threatening physical harm to plaintiff's employees occurred is not alleged is without merit, as the petition sets out the place, plaintiff's store, and the time—the period from May 31, 1962 when the picketing began to June 22, 1962 when it was stopped by injunction. Special demurrer 5 was met by amendment alleging facts called for by the demurrer.

3. Motion for new Trial.

(a) General grounds. The evidence was amply sufficient to establish the allegations of the petition that the defendants Law and Jaudon and other members of the N.A.A.C.P. formed a conspiracy among themselves to in-

jure and damage plaintiff's business and to seek to put him out of business by picketing his place of business as punishment of him for (as they claim) beating a 14 year old negro boy who worked for him. Law testified that he selected the pickets, placed them at designated points around plaintiff's store, and maintained them there until enjoined by the court and that he himself served on the picket line from time to time. Large numbers of people joined in the picketing, at times blocking the sidewalks and making it necessary for plaintiff's employees and customers to walk in the street and blocking their entrance or making it difficult to enter. There was also evidence of mass picketing of the plaintiff's place of business effected by surrounding the premises and sidewalks adjacent thereto with large numbers of people, so as to prevent persons from entering his store, by creating an atmosphere of violence around the premises by inciting, inflaming, and prejudicing customers all of which caused customers to be fearful of doing business with him. The plaintiff and his wife and employees were threatened with violence, called vile and vulgar names. Bricks and rocks were thrown through the windows and onto the roof. A pistol was shot from the vicinity of the picket line, the bullet passing over the head of a customer who lived directly back of the store. The employees were threatened with physical harm if they continued to work for plaintiff.

Counsel for defendant contends that the evidence did not show that the pickets placed by the N.A.A.C.P. committed the various acts outlined above. However, the evidence is undisputed that all was peace and quiet around plaintiff's place of business until the picketing began and it returned only after the defendants were enjoined from further picketing of the place. The evidence was sufficient for the jury to conclude that as a result of the mass meet-

ing of the N.A.A.C.P. the picketing began, that the picketing was led by pickets placed on the picket line by Law, that they were joined by large numbers of sympathizers or other members of the conspiracy, and that the presence of the pickets brought about mass picketing, threats, violence, the use of vile, vulgar and indecent language toward plaintiff, his wife, employees and customers. The picketing was not peaceful, thus unlawful; and it was for an unlawful purpose—punishment of plaintiff for the alleged commission of a criminal offense, assault and battery.

(b) In determining whether there was sufficient evidence to establish a cause of action as against the defendants, the Savannah Chapter of the N.A.A.C.P., the N.A.A.C.P. corporation of New York, and the Georgia Conference of Branches of the N.A.A.C.P., it must be determined whether there is evidence that the defendants Law or Jaudon were acting as agents of said defendants. The evidence shows that the defendant Law was President of both the Savannah Branch and of the Georgia State Conference of Branches of the N.A.A.C.P., a New York corporation. Acting in that capacity he, by means of the circulars, called a mass meeting of the N.A.A.C.P. and of the Savannah Chapter of the N.A.A.C.P., in which meeting he and Jaudon participated and led the group in reaching the conclusion that the N.A.A.C.P. would picket the plaintiff's place of business with the view of injuring and damaging his business by inducing customers and prospective customers to refrain from trading with him; and, pursuant thereto, Law selected pickets, placed them at various places around plaintiff's place of business, picketed himself, and generally directed the picketing. "The function of the N.A.A.C.P.," according to Law, "is to give aid and assistance to people in the minority group, meaning the negro group in seeking their rights and protection under the Constitution." In furtherance of that plan

the N.A.A.C.P. corporation of New York acts and operates in Georgia through the Savannah Chapter and other chapters, which compose the defendant, Georgia State Conference of Branches of the N.A.A.C.P. The petition was served upon the N.A.A.C.P. corporation, the Savannah Branch, and the Georgia State Conference of Branches of the N.A.A.C.P. by serving Law, as their agent. No plea to the jurisdiction or traverse of service was filed by any defendant, but each submitted to the jurisdiction of the court by filing answers, not made subject to their general demurrer, which alleged that the plaintiff did not state a cause of action against the defendant.

The Savannah Branch used the corporate name, N.A.A.C.P., and held itself out as representing the national corporation. The national corporation gave orders and counsel to its local representatives at annual conventions; the locals were affiliated with the national organization, and under its corporate charter, were units thereof; one paying dues to the local N.A.A.C.P. also became a member of the national N.A.A.C.P.; members of the local were members of the national N.A.A.C.P. and a portion of the dues went to the N.A.A.C.P. corporation. These facts evidence that the locals are within the framework of the national organization and are used in furtherance of the latter's business and interest. "The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf." *Code* § 4-101. A contract or an express agency agreement is not necessary to establish the relation. *Hubert* v. *Harpe,* 181 Ga. 168, 169 (182 S E 167). "The fact of agency may be established by proof of circumstances, apparent relations, and the conduct of the parties. . . ." *Cable Co.* v. *Walker,* 127 Ga. 65 (1) (56 S E 108), and "A claim of agency may be established by circumstantial evidence. . . ."

Universalist Convention v. *Guest,* 179 Ga. 168 (2) (175 S E 466) and cases cited.

The national corporation never at any time disavowed the agency of Law, Jaudon, or the Savannah Chapter in acting for it in this matter. It was notified of the action by Law. It came into court and defended the case on its merits, contending that a cause of action was not alleged or proven against them.

If Law originally acted without authority and assumed to act for them without authority, they had the option to repudiate or ratify the act, but they were required to do one or the other. And where, as here, they never repudiated the act, they are deemed to have affirmed it. See Mechem, Outlines of Agency (3rd Ed.), p. 94, § 152, *Southern Motors of Savannah* v. *Krieger,* 86 Ga. App. 574 (71 S E 2d 884); *Haney School Furn. Co.* v. *Hightower Bapt. Inst.,* 113 Ga. 289 (2) (38 S E 761); *Glisson* v. *Burkhalter,* 31 Ga. App. 365 (4) (120 S E 664).

We are of the opinion that the record supports the conclusion that Law acted as agent of the defendant's Savannah Chapter, and of the N.A.A.C.P. New York corporation, and within the scope of his authority in calling the mass meeting, holding the meeting, in concluding to picket plaintiff's store and in picketing it, causing injury and damage thereto.

(c) We do not believe that the evidence is sufficient to render the defendant Georgia State Conference of Branches of the N.A.A.C.P. responsible for the acts of Law, Jaudon and other members of the Savannah Branch of the N.A.A.C.P. in picketing and damaging plaintiff's business. There is no evidence that that organization had anything to do with this matter. While Law was president of that defendant, there is no evidence that he purported to act for it in calling a mass meeting to deal with plaintiff or in carrying out the plan agreed upon to picket

plaintiff's business, nor that any other member purported to be acting as agent or in behalf of that defendant. So far as the record shows, no branches of the Georgia State Conference of Branches of the N.A.A.C.P. other than the Savannah Branch, participated in the conspiracy or authorized anyone to act for them, or ratified any acts of Law or anyone else who may have purported to act for them.

Thus we conclude that as to the Georgia State Conference of Branches of the N.A.A.C.P. the verdict was without evidence to support it, and that the court erred in not granting the motion for new trial as to this defendant. As to the defendants, Law, Jaudon, the Savannah Chapter of the N.A.A.C.P. and the N.A.A.C.P. corporation, the general grounds of the motion for new trial are without merit.

4. Compensatory and punitive damages.

(a) The jury awarded the plaintiff compensatory damages of $35,793.05 and punitive damages of $50,000.00.

Plaintiff alleged and the evidence supported the allegations that his net income from his business for the twelve months preceding the picketing was $3,018.26 and he suffered a loss of $952.19 during the twelve months following the beginning of the picketing, or a net loss of $3,970.45, which was the result of defendants' picketing his place of business; that the loss would have been much greater but for his action in terminating the services of seven of his eight employees and his wife and himself increasing their work at the store from three or four hours per day to twelve to fourteen hours. Plaintiff testified that he planned to continue in business for ten to twelve years, and his age and condition would support the conclusion that he could do so. It is uniformly recognized that good will is a species of property and constitutes a valuable asset of the business of which it is a part. 24 Am. Jur., 804, § 4.

"Good will is an attribute of a business. . . ." 24 Am. Jur., 807, § 10. "Good will is the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage and resort to the old place." *Armstrong* v. *Atlantic Ice & Coal Corp.*, 141 Ga. 464, 466 (81 S E 212). The evidence shows conclusively that the plaintiff's business enjoyed the good will of the negro community prior to the picketing by defendants, as two of every three of his customers were negroes, and that the picketing of his store by defendants destroyed the good will of the negroes, as they stopped trading with him. To wrongfully injure and damage the good will of plaintiff's business gives a cause of action in tort for the resulting damage. In determining the value of the good will and the amount of damage thereto, the actual loss of earnings, as the proximate result of the tort, may be considered in determining the amount of damages to the good will of plaintiff's business. Thus, the evidence as to loss of earnings present and future and other evidence of damage to the good will of plaintiff's business caused by the illegal picketing thereof would support a finding that he suffered more than $40,000.00 in actual damages. The verdict of $35,793.05 as compensatory damages suffered by plaintiff was authorized by the evidence and was not excessive.

(b) This division has been re-written to include discussion of the complaints thereto made in the motion for rehearing. Punitive damages in the amount of $50,000 were awarded plaintiff by the jury. *Code* § 105-2002 provides: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." This court in the recent case of *Cook* v. *Robinson*, 216 Ga. 328, 332 (10)

supra, held that allegations of the petition that the defendants damaged petitioner in a named amount by their wilful, deliberate, wrongful and unlawful deeds, acts, etc., committed pursuant to a conspiracy among them to unlawfully ruin and destroy plaintiff's business, stated a cause of action for punitive damages, citing *Code* § 105-2002 and *Walker* v. *Grand International Brotherhood &c. Engineers,* 186 Ga. 811 (199 S E 146). The allegations of plaintiff's petition were substantially the same and stated a cause of action for punitive damages, and the evidence was sufficient to support same as shown by a review of the evidence on the general grounds in Division 3(a).

Plaintiffs-in-error complain for the first time in their motion for re-hearing of the court's charge on punitive damages. While the amended motion for new trial contains twenty-five special grounds, it did not contain one complaining of the charge on punitive damages. Thus the question was not submitted to the trial court, was not passed upon by that court, is not excepted to in this court, and thus under the law of this State cannot be considered by this court. Under the Constitution of this State, Art. VI, Sec. II, Paragraph IV, *Code* § 2-3704, this is a court alone for the trial and correction of errors of law from the superior courts and other named courts, and "The Supreme Court . . . shall not decide any question unless it is made by a specific assignment of error in the bill of exceptions . . ." *Code Ann.* § 6-1607 (Ga. L. 1892, p. 113); *Brown Transport Corp.* v. *Truck Drivers & Helpers Local Union No. 728,* 218 Ga. 581, 584 (129 S E 2d 767) and cases cited.

Punitive damages are recoverable in this case under *Code* § 105-2002 either "to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." The evidence would support the verdict on either theory. The plaintiff could not recover

for both, nor does the record indicate that the jury awarded punitive damages on both.

It is a question for the jury when punitive damages shall be allowed as well as the amount of such damages. *Batson* v. *Higginbothem,* 7 Ga. App. 835, 839 (2) (68 S E 455); *Kolodkin* v. *Griffin,* 87 Ga. App. 725, 731 (5) (75 S E 2d 197).

The measure of damages where punitive damages are recoverable is to be fixed by the enlightened conscience of an impartial jury. *Selman* v. *Barnett,* 4 Ga. App. 375 (2) (61 S E 501); *Head* v. *John Deere Plow Co.,* 71 Ga. App. 276, 279 (4) (30 S E 2d 662).

"The question of damages being one for the jury, the court should not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." *Code* § 105-2015. See also *Lang* v. *Hopkins,* 10 Ga. 37 (3); *Adkins* v. *Williams,* 23 Ga. 222 (2); *Thorpe* v. *Wray,* 68 Ga. 359 (3a); *Realty Bond & Mort. Co.* v. *Harley,* 19 Ga. App. 186 (2) (91 S E 254); *Fields* v. *Jackson,* 102 Ga. App. 117 (1) (115 S E 2d 877). This court cannot say that the amount awarded as punitive damages is excessive.

5. Special grounds for new trial. Special ground 1. While it was not relevant in this case whether the defendant Law, as President of the Savannah Chapter and the Georgia State Branches of the N.A.A.C.P., had picketed on other occasions without first talking to and trying to negotiate their differences with the party to be picketed, his answer that that was generally their method and the reason it was not followed here was that the neighborhood was already incensed and the action they endorsed was already in progress, rendered the admission of the evidence harmless.

Special ground 2. The court did not err in permitting the witness to testify over objection that she was pregnant

when she was threatened by someone in the picket line, as the evidence showed that the picket line was established by the defendant Law, acting for the N.A.A.C.P. The fact that she was seven months pregnant and was threatened in that condition goes to the gravity of the picketing and would be material on the question of its unlawfulness.

Special ground 3. It was not error to admit, over the objection that none of the defendants were present, testimony of the witness as to threats and other remarks the negroes standing on the corner and across the street made to her when she traded at the store, as Law admitted that he assisted in placing the pickets on the picket line, and the evidence shows that several of the remarks were made by the pickets and others assisting them in picketing.

Special ground 4. The admission of the testimony objected to in special ground 4 was not error for any reason assigned.

Special grounds 5, 6, 7, and 8 objecting to testimony as to threats, acts of violence, cursing, use of vulgar language, and a pistol shot by those picketing the plaintiff's place of business, are without merit. As pointed out by the trial judge in overruling these grounds, it clearly appears from the evidence that the presence of the pickets incited acts of violence around the place and that if the presence of the pickets and what they told people brought about the situation of tenseness and lawlessness about plaintiff's place of business, the pickets and those responsible for them would be liable, if the picketing was not justified or amounted to mass picketing. This evidence was admissible on the question of liability of defendants for the damage done to plaintiff's business and responsibility of the defendants therefor.

Special grounds 10, 11, 12, 17, 18, 19, 20, and 21. The rulings heretofore made on direct exceptions to the denial of nonsuits and on the general grounds dispose of adversely to the plaintiff-in-error special grounds 10 and 11, complaining of the trial court's refusal to grant a non-suit, special ground 12 of failing to direct a verdict, and special grounds 17, 18, 19, 20, and 21 which complain that the verdict is contrary to law because it deprives defendants of their right to freedom of speech and of their property without due process of law in violation of the United States Constitution.

Special grounds 22, 23, and 24 complaining respectively of the charges "Before the plaintiff can recover, you must be satisfied that the preponderance of the credible evidence in this case showed that the defendants conspired to unlawfully injury (sic) plaintiff in his business and by illegal acts did in fact injured (sic) him;" "Now I charge you that one has a right to do business, and that right is a property right, and if that right is interfered with he can recover damages;" and, "But whatever your verdict is, it should be signed and dated by your foreman," are so obviously without merit they are overruled without discussion. Plaintiff-in-error did not argue them.

Special ground 14. It was not error to charge "as the court sees it, you can't get agency and conspiracy separated in this case," as the question was whether there was a conspiracy to violate plaintiff's rights by the N.A.A.C.P. defendants acting by and through their agents Law, Jaudon, and other members of the N.A.A.C.P.

Special ground 15. It was not error to charge the jury that "you can consider the effect of the picket. Did the pickets incite—were the fact that the pickets were there incite activity upon people who were not at all connected with the organization; and if that was incited by the

pickets, by their mere presence, you could consider the pickets and the placing of the pickets as the proximate cause of what resulted." The court continued, "But if that was an entirely independent efficient cause that had nothing to do with the pickets, if you find that was true, of course the pickets nor the organizations who placed them there could be responsible. So you have to determine. Proximate cause is always a question of fact for the jury." The court's charge taken as a whole made it clear that if the picketing incited others, who were not pickets, to do acts against the plaintiff's business that the picketers would be a contributing proximate cause of what resulted, but if these were entirely independent efficient causes that had nothing to do with the pickets, the pickets would not be responsible therefor.

In response to the motion for re-hearing, we wish to point out that a conspiracy to wrongfully, unlawfully, and maliciously injure and damage plaintiff's business and to put him out of business is charged against the defendants; that such conspiracy was formed at a mass meeting of the N.A.A.C.P. called by the defendants Law and Jaudon, and that pursuant thereto picketing began the next day and continued until stopped by the court; and that there was violence, threats against plaintiff and his employees, bricks and rocks thrown into and on top of the store, blocking of the sidewalks and entrance to his store, mass picketing, harassment and intimidation of customers and employees, coming from the mass of negroes picketing the place, some of whom were admittedly those representing the defendants and placed there by Law. "The law recognizes the intrinsic difficulty of proving a conspiracy. . . . The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances." *Woodruff* v. *Hughes*, 2 Ga. App. 361 (58 S E 551); *Horton* v. *John-*

son, 192 Ga. 338, 346 (15 S E 2d 605). "A conspiracy or common intent may be shown to have existed between the parties by proof of acts and conduct, *Davis* v. *State,* 114 Ga. 104 (39 S E 906); *Odum* v. *State,* 183 Ga. 854 (190 S E 25); and it may be shown by circumstantial or direct evidence. *McElroy* v. *State,* 125 Ga. 240 (2) (54 S E 125)." *Huckaby* v. *Griffin Hosiery Mills,* 205 Ga. 88, 91 (52 S E 2d 585). Applying those principles here, the evidence would authorize the jury to find that such violent and unlawful picketing was the proximate result of the conspiracy without specific proof that one or more of the pickets placed there by Law were the ones who threw the rock, or performed other specific acts of violence, intimidation, etc.

The principles enumerated in *Wright* v. *State of Georgia,* 373 U. S. 284; *Terminiello* v. *City of Chicago,* 337 U. S. 1, rehearing den. 337 U. S. 934; *Near* v. *Minnesota,* 283 U. S. 697; *Cantwell* v. *Connecticut,* 310 U. S. 296, cases relied upon by defendants in their motion for rehearing on this ground are distinguishable on their facts. The principle is explicitly stated and applied in *Wright* v. *Georgia, supra,* where the Supreme Court of the United States reversed this court, holding that the convictions of negro children playing in a park in Savannah, formerly used exclusively by whites, cannot be sustained on the ground that their presence there "was likely to cause a breach of the peace by others, since the possibility of disorder by others cannot justify exclusion of a person from a place where he had a constitutional right to be." There was disorder, violence, intimidation, etc. here—not the mere possibility of such; and furthermore, the pickets had no lawful or constitutional right to form a conspiracy to violate plaintiff's right to operate his business, where he was not infringing any of their rights, or to force him out of business as punishment for committing a misdemeanor upon one of his employees or prevent or attempt to prevent

his employees from continuing in his employ by intimidation, force or violence, etc.

This case does not involve a controversy between the races. The relation of this white storekeeper and the negroes of this community were obviously friendly and cordial, for his business depended upon their friendship and good will. He had both, as evidenced by the fact that more than two-thirds of his customers were negroes. He had built this good will over a number of years which must have required his good will toward them. The single incident, whether caused by plaintiff firing the boy or whipping him—whichever is true—and the evidence as to what occurred is inconclusive, would not justify the conclusion that the boy's race had anything to do with it. There is no evidence that what happened occurred because he was a negro. It might as well have happened to a white boy. This is obviously not a case of peaceful picketing to protest racial discrimination.

Special ground 16, complains that the charge set out above in the ruling on Special ground 15 that if the picketing by the N.A.A.C.P. incited others to join in and commit acts against plaintiff's business, that the act of the pickets would be the proximate cause of the injury deprived the Savannah Branch of the N.A.A.C.P. of freedom of association in violation of the 1st and 14th Amendments of the United States Constitution. The ground does not show that it violates defendant's rights of freedom of association, as contended.

Judgment Reversed as to the defendant, the Georgia State Conference of Branches of the N.A.A.C.P.

Judgment Affirmed as to all other defendants. All the Justices Concur.

APPENDIX B

Order of Supreme Court of Georgia Denying Rehearing, May 7, 1965

Upon consideration of the motion for a rehearing filed in this case it is ordered that it be hereby denied.